No. 94-1361

MAR 6 1995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MARJORIE ZICHERMAN, individually and as executrix of the estate of Muriel A.M.S. Kole, and Muriel Mahalek,

Petitioners,

—v.—

KOREAN AIR LINES CO., LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Are nonpecuniary damages for loss of society recoverable by a nondependent sibling and parent for a death occurring on the high seas during the course of international air transportation?

2. Are nonpecuniary damages for survivor's grief recoverable for a death occurring on the high seas during the course of international air transportation?

3. Are pecuniary damages for loss of support and inheritance recoverable by a nondependent sibling for a death occurring on the high seas during the course of international air transportation?

LIST OF ALL PARTIES AND RULE 29.1 LISTING

A. Petitioners

The Petitioners are Marjorie Zicherman and Muriel Mahalek, who were the plaintiffs-appellees/cross-appellants in the Court of Appeals.

B. Respondent

The Respondent is KOREAN AIR LINES CO., LTD. (hereinafter "KAL") who was the defendant-appellant/cross-appellee in the Court of Appeals. KAL is a Korean corporation engaged in the business of international transportation by air of passengers, baggage and cargo. KAL is a member of The Hanjin Group of Korea, which comprises companies under common management direction. The 23 affiliated companies of The Hanjin Group are:

Hanjin Transportation Co., Ltd.
Hanil Development Co., Ltd.
Hanjin Shipping Co., Ltd.
Jungsuck Enterprise Co., Ltd.
Korea Air Terminal Service Co., Ltd.
Air Korea Co., Ltd.
Jedong Industries, Ltd.
Hanjin Travel Service Co., Ltd.
Hanjin Construction Co., Ltd.
Korea Freight Transportation Co., Ltd.
Hanjin Data Communications Co., Ltd.
Hanil Leisure Co., Ltd.
Hanjin Information Systems & Telecomm. Co., Ltd.
Pyung Hae Mining Development Co., Ltd.
Cheju Mineral Water Co., Ltd.
Union Express, Ltd. Co., Ltd.
Hanjin Heavy Industries Co., Ltd.
Femtco Shipping Co., Ltd.
Oriental Fire & Marine Insurance Co., Ltd.
Korean French Banking Corporation - SOGEKO
Hanjin Investment & Securities Co., Ltd.
Inha University Foundation
Jungsuck Foundation

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is officially reported at 43 F.3d 18 (2d Cir. 1994) and is reproduced in the Appendix to the Petition for Writ of Certiorari at A1-11. References preceded by "A" refer to pages in the Appendix to the Petition. The opinion of the district court is officially reported at 807 F. Supp. 1073 (S.D.N.Y. 1992) (A12-42).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on December 5, 1994.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND TREATY PROVISIONS INVOLVED

The applicable statute is the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.* ("DOHSA"). The applicable treaty is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No 876 (1934), *reprinted in* note following 49 U.S.C. App. § 1502 ("Warsaw Convention"). The pertinent provisions are set forth in the Appendix hereto at RA5-8.

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[1] Although the Petition for Writ of Certiorari at 2 (hereinafter "Petition"), states that the date of the Opinion is November 3, 1994, Petitioners actually are referring to the Opinion issued on December 5, 1994, which replaced the Opinion issued on November 3, 1994, following the filing of a Petition for Rehearing by KAL. *See* Judgment and Order dated December 5, 1994 reproduced in the Appendix hereto at RA1. References preceded by "RA" refer to pages in the Appendix hereto.

STATEMENT OF THE CASE

A. Nature of the Case

This Petition involves only the question of the properly recoverable damages for the death of MURIEL KOLE (hereinafter "the decedent"), a passenger killed on KAL flight KE007, which was shot down by Soviet military aircraft on September 1, 1983. The Petitioners are Marjorie Zicherman, the decedent's adult sister, and Muriel Mahalek, the decedent's mother, who sought damages individually and on behalf of the estate of the decedent.

The action is governed by the Warsaw Convention, as supplemented by the Montreal Agreement,[2] and the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.* ("DOHSA"). The Warsaw Convention, together with the Montreal Agreement, serves to limit an air carrier's liability for passenger injury or death to the sum of $75,000 per passenger, unless the injury or death was proximately caused by the "wilful misconduct" of the air carrier within the meaning of Article 25 of the Convention. Although the Warsaw Convention has been held to create a wrongful death action for passengers killed during "international transportation by air,"[3] the Convention is silent on the types of recoverable compensatory death damages and the proper beneficiaries. These issues intentionally were left by the drafters of the Convention for determination by the internal damage law of each contracting party to the Convention. Warsaw Convention, Article 24, 49 Stat. 3020 (RA5).

DOHSA is the internal damage law of the United States applicable to all deaths occurring on the high seas. 46 U.S.C.

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[2] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, *reprinted in* note following 49 U.S.C. App. § 1502 (approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302).

[3] *In re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d 400, 412 (9th Cir. 1983); *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

§ 761 (RA7). It is undisputed that the death of the decedent occurred on the high seas within the meaning of DOHSA. DOHSA specifically limits recoverable damages to pecuniary damages only and does not permit the recovery of nonpecuniary damages, such as loss of society and survivor's grief damages.[4]

B. The Course of Proceedings and Disposition Below

1. The Multidistrict Liability Trial

All federal court actions arising out of this air crash disaster were transferred by the Judicial Panel on Multidistrict Litigation ("JPMDL") to the United States District Court for the District of Columbia and Judge Aubrey E. Robinson, Jr. for coordinated and consolidated pre-trial proceedings on the common liability issues. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 575 F. Supp. 342 (J.P.M.D.L. 1983). The issue of whether the destruction of KAL flight KE007 was proximately caused by the "wilful misconduct" of KAL within the meaning of Article 25 of the Warsaw Convention was tried to a jury in the District of Columbia. The jury returned a verdict against KAL and assessed punitive damages of $50,000,000. On appeal, the Court of Appeals for the District of Columbia Circuit vacated the punitive damages award, holding as a matter of law that the Warsaw Convention does not permit the recovery of punitive damages, but affirmed the jury verdict of "wilful misconduct". *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991) ("*Korean Air II*").

The common liability issue having been determined, this case was remanded by the JPMDL to the Southern District of New York, as the original transferor court, for trial on the issue of recoverable compensatory damages.

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[4] *See* 46 U.S.C. § 762 (RA7); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 30-33 (1990); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 622-25 (1978).

2. The Damage Trial in the District Court

Following remand and prior to the damage trial, KAL moved, *inter alia*, for a determination that DOHSA, as the federal law directly applicable to all deaths occurring on the high seas, controls the question of recoverable damages and that DOHSA provides for the recovery of pecuniary losses only and precludes the recovery of nonpecuniary damages for loss of society and survivor's grief. A15. The district court denied KAL's motion and held that Petitioners were entitled to recover nonpecuniary damages for loss of society and survivor's grief. A32-39. At the conclusion of the damage trial, the jury awarded pecuniary and nonpecuniary damages as follows:

A. *Muriel Mahalek (decedent's mother)*

(1) Past and Future Mental Injury (grief damages):	$96,000
(2) Past and Future Loss of Love, Affection and Companionship (loss of society damages):	$28,000

B. *Marjorie Zicherman (decedent's sister)*

(1) Past Loss of Support:	$ 5,000
(2) Past and Future Mental Injury (grief damages):	$65,000
(3) Past and Future Loss of Love, Affection and Companionship (loss of society damages):	$70,000
(4) Loss of Inheritance:	$11,000
(5) Loss of Services:	$ 0[5]

[5] The jury also awarded $100,000 to the estate for decedent's pre-death pain and suffering. A4.

3. The Decision of the Court of Appeals

Article 17 of the Convention creates liability for a passenger death occurring during the course of international transportation by air within the meaning of the Warsaw Convention. Article 17, 49 Stat. 3018 (RA5). The Court of Appeals recognized, however, that the Convention is silent on the types of recoverable damages and the beneficiaries thereof and directs the courts to the applicable internal law of the contracting states for determination of these issues. (A5).

The court held that federal common law is the applicable internal damage law and further held that the best source of federal common law is general maritime law. A5-6. Although the death of the decedent occurred on the high seas within the meaning of DOHSA, which sets forth the types of recoverable damages and the beneficiaries thereof, the Court of Appeals rejected DOHSA as the applicable internal law. A5-7. Rather, the Court adopted, as the applicable internal damage law, the general maritime law principles of *Sea-Land Services v. Gaudet*, 414 U.S. 573 (1974), and concluded:

1. loss of society damages are recoverable, even though the death occurred on the high seas within the meaning of DOHSA, which prohibits the recovery of such damages (A5-7);

2. "only dependents may recover damages for loss of society." (A7-8);

3. under the general maritime law, damages for survivor's grief are not recoverable (A8-9); and

4. pecuniary damages for loss of support and inheritance are recoverable by a sibling of the decedent, conditioned on a showing of financial dependency (A10).

The Court of Appeals set aside the awards of grief damages to decedent's sister and mother. A8-9. The court, finding that the mother was not financially dependent upon the decedent, set aside the loss of society damages awarded to her. A7-8. The court remanded for further consideration the question

whether the decedent's sister was financially dependent upon the decedent at the time of death. A8, A10. Petitioners thereafter filed this Petition for Writ of Certiorari.

REASONS FOR DENYING THIS WRIT

The questions presented for review by Petitioners as to the recoverability of survivor's grief damages and the proper beneficiaries of an award for loss of society and pecuniary damages do not involve issues that justify the grant of Petitioners' writ of certiorari. The questions raised by Petitioners were decided by the court below in accordance with well settled principles of federal and general maritime law. The only portion of the Court of Appeals' decision which *is* contrary to federal and general maritime law and merits review, is the court's initial holding that loss of society damages are recoverable for a death on the high seas.[6] This erroneous holding forms the basis of KAL's Cross-Petition for a Writ of Certiorari.

I

THE DECISION THAT NONPECUNIARY DAMAGES FOR LOSS OF SOCIETY ARE RECOVERABLE ONLY BY FINANCIALLY DEPENDENT RELATIVES IS IN ACCORDANCE WITH DECISIONS OF THE SECOND, FIFTH AND SIXTH CIRCUITS BUT IS IN CONFLICT WITH THE NINTH CIRCUIT

Petitioners are correct that a conflict exists between the decision of the Court of Appeals below and the Ninth Circuit. Petition at 6-7. The court below held that nonpecuniary damages for loss of society are recoverable under general maritime law but only by financially dependent relatives. The decision as to the requirement for dependency is in accord

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[6] *See* 46 U.S.C. § 762 (RA7); *Miles*, 498 U.S. at 30-33; *Higginbotham*, 436 U.S. at 622-25.

with decisions of the Second, Fifth and Sixth Circuits. *See Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1060 (1994); *Anderson v. Whittaker Corp.*, 894 F.2d 804 (6th Cir. 1990); *Miles v. Melrose*, 882 F.2d 976 (5th Cir. 1989), *aff'd sub nom. on other grounds, Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

The decision of the Ninth Circuit in *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994), which involved wrongful death actions by nondependent parents of decedents killed in the territorial waters of the United States, is to the contrary. The court in *Sutton* held that dependency is not relevant to the recovery of loss of society damages under general maritime law and allowed nondependent parents of the decedents to recover loss of society damages. 26 F.3d at 916-17.

If the Court determines that the Petition should be granted to resolve this conflict among the Circuit Courts of Appeals as to the prerequisite of financial dependency for a loss of society damage award for a death on the high seas, then the Court should also review and determine the question whether nonpecuniary loss of society damages are recoverable at all for a death on the high seas, as set forth in KAL's Cross-Petition for a Writ of Certiorari.

II

THE DECISION THAT DAMAGES FOR SURVIVOR'S GRIEF ARE NOT ALLOWED DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS AND IS IN ACCORD WITH THE UNIVERSAL RULE THAT SUCH DAMAGES ARE NOT RECOVERABLE UNDER ANY FEDERAL STATUTE, FEDERAL COMMON LAW OR GENERAL MARITIME LAW

The decision of the court below that grief damages are not recoverable does not conflict with any decision of this Court

or any other Court of Appeals and does not involve an important issue requiring review by the Court.

A. There Is No Conflict With Any Federal Law or Decision

Petitioners argue that there are two lines of cases that address recovery of grief damages under federal law: (1) general maritime law, which denies recovery, and (2) civil rights cases, which allow recovery. Petition at 5, 7-9. While Petitioners do not dispute that the court below properly looked to maritime law in determining the types of recoverable compensatory damages (Petition at 7), Petitioners now argue that the court below erred in applying general maritime law to conclude that damages for survivor's grief are not recoverable. Petition at 7-9. Whether one looks to federal common law, general maritime law, federal statutes or civil rights cases, the result is the same—grief damages are not recoverable under general maritime law, federal statutes or federal common law. *See Higginbotham*, 436 U.S. at 621-22 (DOHSA); *Gaudet*, 414 U.S. at 585 n.17 (general maritime law); *Michigan Central Railroad Co., v. Vreeland*, 227 U.S. 59, 70 (1913) (Federal Employers' Liability Act, 45 U.S.C. § 59); *Wahlstrom*, 4 F.3d at 1093 (general maritime law); *Gaston v. Flowers Transp.*, 866 F.2d 816, 819-21 (5th Cir. 1989) (Jones Act, 46 U.S.C. § 688); *Cook v. Ross Is. Sand & Gravel Co.*, 626 F.2d 746, 748-49 (9th Cir. 1980) (Jones Act); *Oldham v. Korean Air Lines*, No. 83-3889, 1994 Westlaw 725277 (D.D.C. Oct. 11, 1994), *appeal filed*, No. 94-5321 (D.C. Cir. 1994) (tort law prohibits recovery for mental injuries to plaintiffs outside of the "zone of danger").

The civil rights cases cited by Petitioners as examples of cases allowing recovery do not support their position. *See* Petition at 7-8 citing *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984); *Berry v. City of Muskogee, Oklahoma*, 900 F.2d 1489 (10th Cir. 1990); *Henry v. Gross*, 803 F.2d 757 (2d Cir. 1986). None of these decisions addresses the recoverability of survivor's grief damages in a wrongful death action.

The court in *Bell*, 746 F.2d 1205, addressed the issue of whether plaintiffs could recover emotional distress damages for a deprivation of their constitutional rights. 746 F.2d at 1265-66. The *Bell* court merely held that plaintiffs may recover emotional distress damages resulting from the conspiracy/cover-up that delayed for 20 years the assertion of their civil rights claim under 42 U.S.C. § 1985. *Id.*

In *Berry*, 900 F.2d 1489, the court concluded that a federal remedy must be fashioned to be applied to civil rights death cases under 42 U.S.C. § 1983 and that remedy should be a "survival" remedy brought by the estate of the deceased victim. 900 F.2d at 1506-07. The court went on to hold that a state wrongful death action would not be precluded, so long as there is no duplication in recovery. 900 F.2d at 1506-07. Because a claim for grief damages is a wrongful death claim, and not a survival claim, recovery in *Berry* would have been based on the applicable state wrongful death statute and not on any federal law.

Henry, 803 F.2d 757, involved an action by a recipient of public assistance challenging the termination of benefits. The court held that an award of $500 for "personal humiliation" and "mental anguish," due to a violation of the claimants' civil rights, was proper. 803 F.2d at 768. Unlike grief damages, the mental anguish damages in *Henry* were for injury to the individual whose civil rights were violated and not for any injury of family members.

On the basis of the *Bell*, *Berry* and *Henry* decisions, Petitioners incorrectly argue that a decision must be made by the Court on which line to follow in Warsaw Convention cases involving a death occurring on the high seas. Petition at 5, 7-9. However, there is no decision to be made, because neither "line" of case law support recovery for *survivor's* grief damages in a death case.

B. There Is No Question of General Importance Involved

Petitioners argue that the drafters of the Convention understood that the phrase "damage sustained" in Article 17 of the Convention to include the mental injury of a surviving family member. Petition at 8-9. Article 17 provides:

> The carrier shall be liable for *damage sustained* in the event of the death or wounding *of a passenger* or any other bodily injury suffered *by a passenger,* if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018 (emphasis added) (RA5).

By use of the phrase "damage sustained" in Article 17, the drafters did not intend to define the types of "compensatory damages"[7] recoverable in an action to which Article 17 applies. Rather, the intention of the drafters and the shared expectations of the contracting parties was that Article 17 simply created carrier liability for "damage sustained" and that "the proper 'measure' of recoverable [compensatory] damages under Article 17 is left to the domestic law of the contracting states." *Korean Air II*, 932 F.2d at 1488; Article 24, 49 Stat 3020 (RA5). *Accord In re Air Disaster at Lockerbie I, Scotland on Dec. 21. 1988*, 928 F.2d 1267, 1274-83 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991) ("*Lockerbie I*"); *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1002 (9th Cir. 1987); *In re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d 400, 412-415 (9th Cir. 1983); *Mertens v. Flying Tigers Lines, Inc.*, 341 F.2d 851, 855, 858 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).

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[7] The phrase "compensatory damages" is used herein to refer to damages except punitive and purely mental anguish damages, which are precluded by Article 17. *See Eastern Airlines v. Floyd*, 499 U.S. 530 (1991)(damages for mental anguish, standing alone, are not recoverable under the Convention because they cannot be considered a "bodily injury" within the meaning of Article 17); *Korean Air II*, 932 F.2d at 1485-90 (punitive damages are not recoverable under the Convention because the Article 17 phrase "damage sustained" is compensatory in nature).

There is nothing in the phrase "damage sustained" which allows for the recovery of nonpassenger grief damages. The determination of whether such damages are recoverable is made solely on the basis of the domestic law of each contracting state. *Mertens*, 341 F.2d at 858 ("It seems clear that the Warsaw Convention left this issue [recovery of grief damages], as it did other issues . . . to the internal law of the parties to the Convention").[8]

The only authority cited in support of Petitioners' interpretation of Article 17 is *Korean Air II*, 932 F.2d at 1487. Petition at 8-9. The issue before the Court of Appeals in *Korean Air II* was whether the Convention permitted the recovery of punitive damages. The issue of the types of recoverable compensatory damages was not argued, briefed, or addressed by the court in *Korean Air II*. The Court of Appeals simply interpreted Article 17 and "damage sustained" to be compensatory and not punitive in nature. *Korean Air II*, 932 F.2d at 1485-86. The *Korean Air II* court recognized that "the proper 'measure' of recoverable [compensatory] damages under Article 17 is left to the domestic law of the contracting states." *Korean Air II*, 932 F.2d at 1488.

The portion of the *Korean Air II* decision relied upon by Petitioners is *dicta*. Petition at 8. Moreover, the portion relied upon was a quote from a commentator addressing what damages are allowed by the national civil law of France and was cited by the *Korean Air II* court merely to distinguish the concept of compensatory from punitive damages. *See Korean Air II*, 932 F.2d at 1487, *quoting* G. Miller, *Liability in Int'l Air Transport* at 112 (Kluwer 1977).[9]

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[8] Moreover, the fact that the Convention contains a limitation of liability (Article 22) is irrelevant to what types of compensatory damages are recoverable. *See* Petition at 8. The limitation of liability affects only the *amount* of damages that a plaintiff may recover, not the types of compensatory damages recoverable. The same types of compensatory damages are recoverable whether the limitation applies or not.

[9] The same commentator, later addressing the types of compensatory damages recoverable under the Convention, states that "Article 17

Similarly, Petitioners' statement that the Court in *Floyd*, 499 U.S. 530, "implied" that grief damages are recoverable under the Convention is incorrect. Petition at 9. *Floyd* addressed the issue of the recovery of mental anguish damages sustained by "*passengers*" on board an aircraft. The Court held that purely mental anguish damages are not recoverable by *passengers* under Article 17 of the Convention because such damages cannot be considered "bodily injury suffered by a passenger". The Court did not address the question whether grief damages or mental injury damages are recoverable by a *non-passenger* as "damage sustained" for the death of a *passenger*.

Petitioners fail to demonstrate that any conflict or important question or controversy exists as to the recovery of grief damages, which warrants review by the Court. Indeed, Petitioners are unable to cite to any authority that has allowed recovery of survivor's grief damages under any applicable federal law.

III

THE PETITION FAILS TO STATE A REASON WHY THE DECISION THAT SIBLINGS MUST PROVE DEPENDENCY TO RECOVER ANY PECUNIARY LOSS IS INCORRECT AND SHOULD BE REVIEWED

Although raised as a question presented (Petition at i), Petitioners do not advance any valid reason why the Court should review the decision of the court below that pecuniary damages may only be recovered by a sibling who was financially dependent upon the decedent at the time of death. Petition at note 4.

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does not regulate the question of recoverable damages but only sets the conditions necessary for a carrier to be liable" and that the type of recoverable damages is determined by reference to the domestic law. *Miller*, at 125.

In fact, the decision of the Court of Appeals is consistent with well settled authority that the threshold requirement for the recovery by a sibling of *any* pecuniary damages under DOHSA[10] *or* general maritime law is that the sibling was financially dependent upon the decedent at the time of death. *See Wahlstrom*, 4 F.3d at 1090; *Evich v. Connelly*, 759 F.2d 1432, 1433 (9th Cir. 1985); *First Nat'l Bank in Greenwich v. National Airlines, Inc.*, 288 F.2d 621, 624 (2d Cir.), *cert. denied*, 368 U.S. 859 (1961); *In re ABC Charters*, 558 F. Supp. 364, 366 (W.D. Wash. 1983); *Glod v. American President Lines*, 547 F. Supp. 183, 185 (N.D. Cal. 1982); *Muirhead v. Pacific Inland Navigation, Inc.*, 378 F. Supp. 361, 362 (W.D. Wash. 1974).

The decision of the court below is consistent with the general maritime law, which requires a showing of financial dependency for a sibling to recover any pecuniary damages. There is no need for the Court to review this aspect of the decision of the court below.

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[10] The schedule of beneficiaries in DOHSA limits the beneficiaries to the "decedent's wife, husband, parent, child or *dependent relative*". 46 U.S.C. § 761 (emphasis added) (RA7).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: March 6, 1995

Respectfully submitted,

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